

# **EMPLOYEE PLANS DETERMINATIONS QUALITY ASSURANCE BULLETIN**

## **EGTRRA STAGGERED REMEDIAL AMENDMENT PERIOD AND REMEDIAL AMENDMENT CYCLE FOR INDIVIDUALLY DESIGNED PLANS**

**FY-2007 No. 2**

**Date: September 27, 2007**

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### **Background**

This bulletin replaces revised QAB 2006-2 issued on July 5, 2006 to include the changes made by Rev. Proc. 2007-44.

Rev. Roc. 2007-44 supersedes Rev. Proc. 2005-66 which established cyclical remedial amendment periods under IRC 401(b) for individually designed and pre-approved plans.

Every 401(a) individually designed plan has a five-year remedial amendment cycle (RAC). The cycles are staggered and spread over five-year periods based on the last digit of the Employer's Identification Number (EIN). Within each five-year cycle, employers have a specific time to file for a determination letter. That filing period is the last twelve months of the cycle and runs from February 1 to January 31. Thus, plan sponsors who want reliance will only need to apply for new determination letters generally once every five years. Individually designed plans must be restated when they are submitted for determination letters. Effective July 9, 2007 the Form 6406 (Short Form Application for Determination for Minor Amendment of Employee Benefit Plan) may not be used to apply for a determination letter.

Pre-approved plans have a six-year RAC. This amendment cycle is different for defined contribution and defined benefit plans. All pre-approved defined contribution plans have the same six-year RAC. A separate six-year remedial amendment cycle applies to all pre-approved defined benefit plans. Generally, sponsors, practitioners, and adopters of pre-approved plans only need to apply for new opinion, advisory letters or determination letters (for those adopting employers who have made changes to the pre-approved plan and want reliance) once every six years. Pre-approved plans will be covered in a separate Quality Assurance Bulletin issued later.

### **Cumulative List**

The Cumulative List of Changes in Plan Qualification Requirements (Cumulative List-CL) is published annually, usually around mid-November. The Cumulative Lists are intended to identify all changes in the qualification requirements resulting from statutory, regulatory, or other changes in guidance published in the Internal Revenue Bulletin that are required to be taken into account in the written plan document for an upcoming cycle. Specialists will review plans whose submission period begins on February 1<sup>st</sup> following issuance of the Cumulative List.

Specialists will not consider in their review any guidance issued, or any statutes enacted, after the October 1<sup>st</sup> preceding the date the applicable Cumulative List is issued. Further, specialist will not consider in their review qualification requirements that become effective in a calendar year after the calendar year in which the submission period begins with respect to the applicable CL, or statutes that are first effective in the year in which the submission period begins with respect to the applicable CL for which there is no guidance identified on the applicable CL. Although individually designed plans and multiple employer plans submitting determination letter applications may be amended for PPA'06, Specialists will not consider these PPA '06 provisions in their review of plans using the 2006 and 2007 Cumulative Lists except with respect to terminating plans. If plans are amended for PPA'06 the provisions must be identified in an attachment to the application or in a cover letter.

*EXAMPLE 1: An individually designed plan that is filing under Cycle B will be submitted for a determination letter between February 1, 2007 and January 31, 2008. The Specialist will review the plan for Cycle B based on the 2006 CL.*

### **Remedial Amendment Cycle (RAC)**

In general, an individually-designed plan's five-year RAC is determined by reference to the last digit of the EIN of the employer sponsoring the plan (including a self-employed person with no employees). The initial RAC for a new plan is the applicable cycle that includes the date on which the plan's initial remedial amendment period under Section 1.401(b)-1 of the Income Tax Regulations (determined without regard to the extension in section 5.03 of Rev. Proc. 2007-44) ends. The cycles are determined as shown in Table 1. Table 2 outlines unusual circumstances and exceptions to the general rule.

### **Remedial Amendment Period (RAP)**

The RAP is the period during which a plan may be amended retroactively to comply with the Code's qualification requirements. Section 1.401(b)-1 of the Income Tax Regulations describes the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted.

**Table 1: Determination of Cycle Based on EIN**

<b>If the last digit of the plan sponsor's EIN is--</b>	<b>The plan's cycle is--</b>	<b>Last day of the initial cycle</b>
1 or 6	Cycle A	1-31-07
2 or 7	Cycle B	1-31-08
3 or 8	Cycle C	1-31-09
4 or 9	Cycle D	1-31-10
5 or 0	Cycle E	1-31-11

**Table 2: Exceptions to the General Rule for Individually Designed Plans**

<b>AFFILIATED SERVICE GROUP (ASG) AND/OR CONTROLLED GROUP(CG)</b>	For a plan maintained by multiple members of an ASG or a CG under IRC 414(b), (c), or (m) the 5-year RAC is determined by the last digit of the EIN that is or will be used on Form 5500. This exception does not apply to multiemployer, multiple employer, or governmental plans. See their exceptions below.
	<b>ELECTION OF CYCLE A</b>
	If more than one plan is maintained by members of an ASG, or a CG under IRC 414(b), (c), or (m) including a parent-subsidary organization, Cycle A may be elected as the 5-year cycle for all plans (other than multi employer, multiple employer, governmental or jointly trustee plans). The election must be made jointly by all members of the ASG or the CG* or may be made on behalf of all the members by the parent, in the case of a parent-subsidary group.
	<b>PARENT-SUBSIDIARY CONTROLLED GROUP</b>
	If more than one plan is maintained by a CG under IRC 414(b) or (c) and it is a parent-subsidary CG organization, an election may be made that the RAC be determined by the last digit of the parent's EIN. This election is to be made by the parent.* If the parent is a foreign entity with no EIN then the highest U.S. entity's EIN can be used to elect Cycle A above or this election.
<b>CENTRALIZED ORGANIZATION</b>	Separate tax-exempt organizations which are a group of related organizations but are not a CG under IRC 414(b) or (c) or an ASG under 414(m) that are maintaining separate plans where the plan terms are substantially the same, may elect to use the EIN of the centralized organization. The centralized organization (such as a national headquarters or a common administrative committee) handles all or substantially all of the operations and discretionary authority concerning the plan's administration. The election will be made by such centralized organization. *
<b>JOINTLY TRUSTEED SINGLE ER CBP</b>	Use the EIN on the 5500 for the joint board of trustees for the collectively bargained plan (CBP) when they are treated as the plan sponsor for purposes of Form 5500.
<b>SELF-EMPLOYED</b>	Submissions will be based on the last digit of the employer's EIN. However, for the first determination letter submitted under Rev. Proc. 2005-66/ 2007-44, the determination letter application based on the last digit of the individual's SSN will be processed as an "on cycle" application.
<b>MULTIPLE ER</b>	Cycle B (except for governmental multiple employer plans)
<b>GOV'T PLAN</b>	Cycle C (including governmental multiple employer and multiemployer plans)
<b>MULTI-ER PLAN</b>	Cycle D (except for governmental multiemployer plans)
<b>ELECTING TO BE A MULTI EMPLOYER PLAN</b>	If by August 17, 2007 an election is filed with PBGC to be a multiemployer plan or to revoke a previous election to not treat the plan as a multiemployer plan then the change in status of the plan is deemed to occur on the date of the submission for purposes of determining the 5 year RAC regardless of whether PBGC ultimately approves the submission. However, the next five-year cycle may change depending on the approval of PBGC or compliance with the applicable rules to maintain the plan's multiemployer status.

**Footnote from Table 2 \*** *The signed and dated election must be made by the end of the earliest cycle (determined as of the date of the election) for which a determination letter (DL) application would have been required to be submitted or by the end of Cycle A, in the case of an election to choose Cycle A. The election must list all members of the group, including EINs, and all plans (other than multiemployer plans, multiple employer plans, governmental plans, or jointly trustee plans) that are maintained by each member of the group. The election must be filed with each DL application that is submitted in accordance with Rev. Proc. 2007-44 for any plan (eligible for the election) maintained by any member of the group. Once made the election will apply and may not be modified or revoked. A new member of a CG or ASG must make an election no later than one year from the date the new member joins the CG in order for the existing members to retain the original joint election, and an updated list of current members and plans must be maintained. The members already in the group do not need to make a new election each time a new member joins, or when a member leaves the CG. In the case of a parent-subsidary controlled group or a tax-exempt centralized organization, a new election does not have to be made each time a member joins or leaves the group as long as the election made by the parent contains a designation that the election applies to subsidiaries acquired in the future, and that it will not apply to plans of the subsidiaries that, in the future, are no longer in the CG. An updated list must be maintained and attached when this election is filed. Once made, the election will apply and may not be modified or revoked unless there is a cycle changing event such as a merger, acquisition, plan spin-off, change in EIN plan sponsorship, CG or ASG, etc. (See Section 11 of Rev. Proc. 2007-44)*

If there is a cycle-changing event resulting in a merger, acquisition, plan spin-off, change in EIN, CG or ASG, etc. of the employer that maintains the plan, the RAC will be determined on the basis of the changed EIN, CG status, ASG status, etc. of the employer that maintains the plan. This change could result in the need to make a new election.

If one of the above transactions shortens the post-change cycle (cycle applicable to the plan after the cycle-changing event) to less than 12 months then the plan's post-change cycle is extended for 12 months and the next five year cycle will be shortened accordingly. This extension does not apply to other plans of the employer that are not similarly affected.

If the plan's five-year RAC has changed because of one of the above cycle- changing events then the cover letter or an attachment to the application must be submitted with the Form 5300 to explain why there was a change in the plan's cycle.

The applicable cycle after a cycle-changing event will be determined based on the following criteria:

- If the post-change cycle is expired the plan's cycle will be the pre-change cycle.
- If the post-change cycle is after the pre-change cycle and the pre-change cycle is open **or** expired, then the plan is permitted to treat the pre-change cycle as the applicable cycle.
- If the post-change cycle and the pre-change cycle are not open cycles the plan's applicable cycle is the post-change cycle.

See section 11.03 of Revenue Procedure 2007-44 for the definitions of these terms.

## **Changing from Pre-Approved Status to Individually Designed**

Revenue Procedure 2007-44, section 17, contains definitions and rules applicable to prior adopter, intended adopter, new adopter and replacement plan adopter. These rules describe how adopting employers of pre-approved plans can stay within the six-year RAC. These rules will be discussed further in a QAB on pre-approved plans. In general, an employer making amendments to a pre-approved plan continues to be on the six-year RAC on a continuing basis, except as described below.

### **A. Switching to an Individually Designed Plan**

An employer that is a prior adopter or an intended adopter of a pre-approved plan and switches to an individually designed plan will stay on the current six year cycle and then switch to the five year individually designed cycle beginning immediately after the end of the current six year cycle. However, if the end of the first five year cycle that ends after the closing of the six year cycle is less than twelve calendar months after the date of the favorable determination letter, then the plan's current cycle is extended for twelve calendar months and the next five year cycle will be shortened accordingly.

### **B. Amending out of Prototype Status**

An employer stays on the six-year RAC only for the current cycle, and then switches to the five-year RAC if the employer amends the plan to incorporate a type of plan or provision not allowed in the pre-approved program (as described in sections 6.03 and 16.02 of Rev. Proc. 2005-16) and the amendment is adopted more than one year after the employer initially adopted the pre-approved plan.

An employer that adopts an amendment which causes a Master or Prototype (M&P) or Volume Submitter (VS) plan to be treated as an individually designed plan, but for remedial amendment cycle purposes remains eligible for the six-year RAC either on a continuing or temporary basis, must file a determination letter application for reliance. The determination letter application must be filed during the approximate two-year period within the six-year RAC that the Service announces for employers to adopt and submit determination letter applications, (if applicable). The Service will use the applicable Cumulative List based on the date of the determination letter submission in its review. Procedures for filing the Form 5300 for an M&P plan are similar to the procedures set forth in section 9 in Rev. Proc. 2007-6, for VS plans, except for the following:

- (1) A list of modifications is not required to be included.
- (2) Any changes adopted by the employer must be made in the form of an amendment and not incorporated into the underlying M&P plan document.

An employer is ineligible for the six-year RAC and is immediately on the five-year RAC if the employer adopts a provision or a plan not allowed in a pre-approved plan as described above, within one year of initially adopting the pre-approved plan, or if the Service in its discretion determines that the plan is individually designed under section 24.03 of Rev. Proc. 2005-16 due to the nature of the amendments.

While it is expected that an M&P sponsor will continue to amend on behalf of the adopting employer even if the adopting employer adopts amendments to the plan, the sponsor no longer has the authority to amend on behalf of the employer if the amendment falls into one of the categories listed in section 6.03 of Rev. Proc. 2005-16 or the Service has exercised its authority under section 24.03 of Rev. Proc. 2005-16.

If the Form 5300 is filed during the five year RAC, and before the approximate two-year period within the six-year remedial amendment cycle the Service will treat the plan as being individually designed and the plan will have to meet the CL applicable as of the date the application is submitted. Therefore, the determination letter (Letter 2002) will include an expiration date.

### **Extension of the EGTRRA Remedial Amendment Period for Individually Designed Plans Submission Process**

Rev. Proc. 2007-44 extends the EGTRRA RAP for individually designed plans to the end of the initial applicable five-year cycle that includes the date on which the RAP would otherwise end. This extension of the EGTRRA RAP extends the RAP for all disqualifying provisions to which the EGTRRA RAP applies, including plan provisions required or permitted to be amended for EGTRRA, final regulations under § 401(a)(9) of the Code (required minimum distributions), Rev. Rul. 2001-62 (applicable mortality table), Rev. Rul. 2002-27 (deemed section 125 compensation), and disqualifying provisions described in Rev. Proc. 2004-25. This extension is only available to plans that satisfy the conditions for eligibility for the EGTRRA RAP as set forth in Notice 2001-42 which requires the adoption of timely good faith EGTRRA plan amendments. The availability of the remedial amendment period with the respect to the three requirements mentioned above is conditioned on the adoption of plan amendments by the time specified in the applicable guidance. In order to determine if the good faith EGTRRA amendments were timely adopted, the specialist should secure the executed good faith amendments. In general, a good faith EGTRRA amendment is adopted timely if it is adopted by the later of the end of the plan year that includes the effective date of the EGTRRA change or the end of the plan's GUST RAP.

The submission period for Cycle A individually designed plans ended on January 31, 2007. On February 1, 2007, the Service began to accept applications for determination letters for individually designed plans that take into account the requirements of EGTRRA, and other items that were identified on the 2006 Cumulative List.

**Individually designed plans must be restated** when they are submitted for determination letter applications for the initial amendment cycle and subsequent remedial amendment cycles. For this purpose, submission of a working copy of the plan in a restated format is sufficient provided that copies of timely executed interim and discretionary amendments are also separately submitted and (in the case of a proposed plan) the prior plan document. The beginning and ending of the filing period, based on EINs, for the staggered EGTRRA remedial amendment cycle is illustrated in Table 3. The table also provides the Cumulative Lists.

**Table 3: Filing Periods with Applicable Cumulative List Dates**

<b>EIN Ends in</b>	<b>Categories to be considered</b>	<b>Cycle</b>	<b>Initial Filing Period for EGTRRA RAP Begins</b>	<b>Initial Filing Period for EGTRRA RAP Ends</b>	<b>Cum List</b>	<b>Initial DL Expiration Date</b>	<b>Next 5 Year RAC</b>
1 or 6	CG or ASG may be submitted	A	2/1/2006	1/31/2007	Notice 2005-101 (2005 CL)	1/31/2012	2/1/2007-1/31/2012
2 or 7	Multiple	B	2/1/2007	1/31/2008	Notice 2007-3 (2006 CL)	1/31/2013	2/1/2008-1/31/2013
3 or 8	Gov't (includes Multiple & Multi gov't)	C	2/1/2008	1/31/2009	2007 CL	1/31/2014	2/1/2009-1/31/2014
4 or 9	Multi-employer	D	2/1/2009	1/31/2010	2008 CL	1/31/2015	2/1/2010-1/31/2015
5 or 0		E	2/1/2010	1/31/2011	2009 CL	1/31/2016	2-1-2011-1/31/2016
If none of the special elections described under table 2 are made, the otherwise applicable cycle applies.							

EXAMPLE 2: Employer M is a C corporation. The last digit of Employer M's EIN is 7. Employer M adopts a new plan, Plan X on January 1, 2006. The cycle for Plan X is Cycle B. The tax year of Employer M and the plan year of Plan X is the calendar year. Since Employer M timely adopted Plan X and made timely good faith amendments, the initial RAC for Plan X ends January 31, 2008. Any remedial amendments required for Plan X to correct a disqualifying provision as described in § 1.401(b)-1(b)(1) must be adopted by January 31, 2008, unless an application for a determination letter is submitted by that date. The determination letter issued for the plan would then be retroactively effective to the first day of the 2006 plan year. The subsequent 5-year RAC ends on January 31, 2013, January 31, 2018, etc.

## On-Cycle Filing of Determination Letters

Within the five-year RAC for an individually designed plan there is a 12-month period of time to file for a determination letter. That filing period is the last twelve months of the plan's five-year remedial amendment cycle and runs from February 1 to January 31. Filing during this twelve month period of time is called "on-cycle" filing. Plan sponsors of individually designed plans that want to preserve reliance on a plan's favorable determination letter must file for a new determination letter during their on-cycle period. Specialists will review the employer's EIN to determine if the application(s) were submitted on-cycle.

Determination letters issued to individually designed plans will include an expiration date and a statement that the letter may not be relied on after the end of the plan's first five-year remedial amendment cycle that ends more than 12 months after the application was received.

The following applications will be given the same priority as on-cycle applications, but will be given off cycle caveats when the Letter 2002 is prepared.

- (1) A terminating plan.
- (2) A new individually designed plan whose next regular on-cycle submission period ends at least two years after the end of the off-cycle submission period during which the plan's sponsor submits its application. (see also Table 4 below)
- (3) Service requires a submission
- (4) Urgent Business need

**Table 4: Exceptions for new plans**

<b>If normal cycle is:</b>	<b>Then a 5300 can be submit for a new plan in the following cycle, if 401(b) is open:</b>
Cycle C, D, or E	Cycle A
Cycle D, E, or A	Cycle B
Cycle E, A, or B	Cycle C
Cycle A, B, or C	Cycle D
Cycle B, C, or D	Cycle E

If a reasonable and good faith interpretation of Revenue Procedure 2005-66 was used to determine that the plan was not a Cycle A plan, and under Rev. Proc. 2007-44 the plan is a Cycle A plan, which should have been submitted by January 31, 2007, then the entity will have until January 9, 2008 to submit the plan to the Service. The plan will be considered on-cycle for Cycle A and will be reviewed using the 2006 CL.



## Off-Cycle Filing of Determination Letters

An application filed outside the 12-month period discussed above is considered to be filed off cycle. Except with respect to terminating plans, the off-cycle filing will be reviewed using the same Cumulative List that would be used for an application that was filed “on-cycle” on the same date as the “off-cycle” filing date. This means that the determination letter issued for the plan may not take into account any or all of the changes in qualification requirements for which the plan must be amended within the plan’s normal remedial amendment cycle. Also, the determination letter may not be relied on after the end of the plan’s first 5 year RAC that ends more than 12 months after the application is received. Consequently, the plan may need to be further amended within that normal cycle and another determination letter application will need to be filed within the last twelve months of the cycle if the plan sponsor wishes to preserve reliance on a determination letter. The applications submitted in an off-cycle period will not be reviewed until all on-cycle plans for that particular year have been reviewed and processed. Specialists will review the employer’s EIN to determine if the application was submitted off-cycle.

*EXAMPLE 3: The remedial amendment cycle for Plan Z is based on the last digit of Employer L’s EIN, which is 0. Plan Z’s cycle is Cycle E. The tax year of Employer L and the plan year of Plan Z is the calendar year. The initial five-year RAC (that is, EGTRRA remedial amendment period) for Plan Z ends January 31, 2011, and the subsequent 5-year RAC ends January 31, 2016. Employer L submits a determination letter application on March 1, 2009. The 2008 Cumulative List will be used to review Employer L’s determination letter submission. Since the initial five-year RAC and the determination letter will expire on January 31, 2011, Employer L will need to amend for the 2009 CL and re-submit a new determination letter application during the last twelve months of the RAC (between February 1, 2010 to January 31, 2011) to continue to have reliance on the determination letter after that date.*

## Interim Amendments

An interim amendment is an amendment with respect to a disqualifying provision defined in section 5.01 of Rev. Proc. 2007-44. For a disqualifying provision or a provision that is integral to a disqualifying provision, an interim amendment must be adopted by the later of (1) the due date (including extensions) for filing the income tax return for the employer’s taxable year that includes the date on which the remedial amendment period begins or (2) the last day of the plan year that includes the date on which the remedial amendment period begins. A plan maintained by more than one employer need not be amended for a disqualifying provision until the last day of the tenth month following the last day of the plan year in which the remedial amendment period begins. A discretionary amendment must be adopted by the end of the plan year in which the amendment is effective. There are exceptions under section 1107 of PPA’06 and when statutes or guidance specify. (See section 5.07 of Revenue Procedure 2007-44.)

Example 4: *Employer N sponsors Plan Y. The tax year of Employer N and the plan year of Plan Y is the calendar year. The last digit of Employer N's EIN ends in 4 and therefore Plan Y's cycle is D. The initial RAC for Plan Y ends January 31, 2010. In January 2008, guidance is issued effective for the plan years beginning on or after January 1, 2009 and first appears on the 2009 CL. Employer N submits a determination letter application on July 1, 2009. The application was received on cycle and will be reviewed using the 2008 Cumulative List. Since the guidance was issued after the October 1<sup>st</sup> preceding the date the 2008 CL was issued and was not identified and included on such list, the Service will not consider in its review the published guidance. These will be treated as interim amendments and must be adopted by the later of:*

- (1) due date of tax return, 3-15-10 plus extensions **9-15-10** or*
- (2) 12-31-09*

The adoption deadline for **governmental plans** within the meaning of § 414(d) of the Code for interim amendments or discretionary amendments is the later of:

- a) the deadline that would apply under the regular applicable rules of section 5.05(1) and (2) of Revenue Procedure 2007-44, or
- b) the last day of the next regular legislative session beginning after the amendment's effective date in which the governing body with authority to amend the plan can consider a plan amendment under the laws and procedures applicable to the governing body's deliberations.

In the case of a **tax exempt employer**, the adoption deadline for interim amendments is set forth in section 2.05 of Revenue Procedure 2007-44 as described below. For purposes of determining the tax filing deadline, the following is substituted for the language under section 2.05(1) describing the due date (including extensions) for filing the income tax return for the employer's taxable year.

The due date for filing the employer's tax return in the case of a tax exempt employer that files Form 990-T (Form 990 or Form 990-EZ if no Form 990-T is filed) is the later of:

- a) the 15<sup>th</sup> day of the 10<sup>th</sup> month after the end of the employer's tax year (treating the calendar year as the tax year if the employer does not have a tax year) or
- b) the due date for filing the Form 990 series (plus extensions).

An employer will not be treated as having obtained an extension of time for filing the Form 990 series unless such extension is actually applied for and granted. The due date for filing the employer's tax return in the case of a tax exempt employer that is not required to file a Form 990 series return is the 15<sup>th</sup> day of the 10<sup>th</sup> month after the end of the employer's tax year (treating the calendar year as the tax year if the employer does not have a tax year).

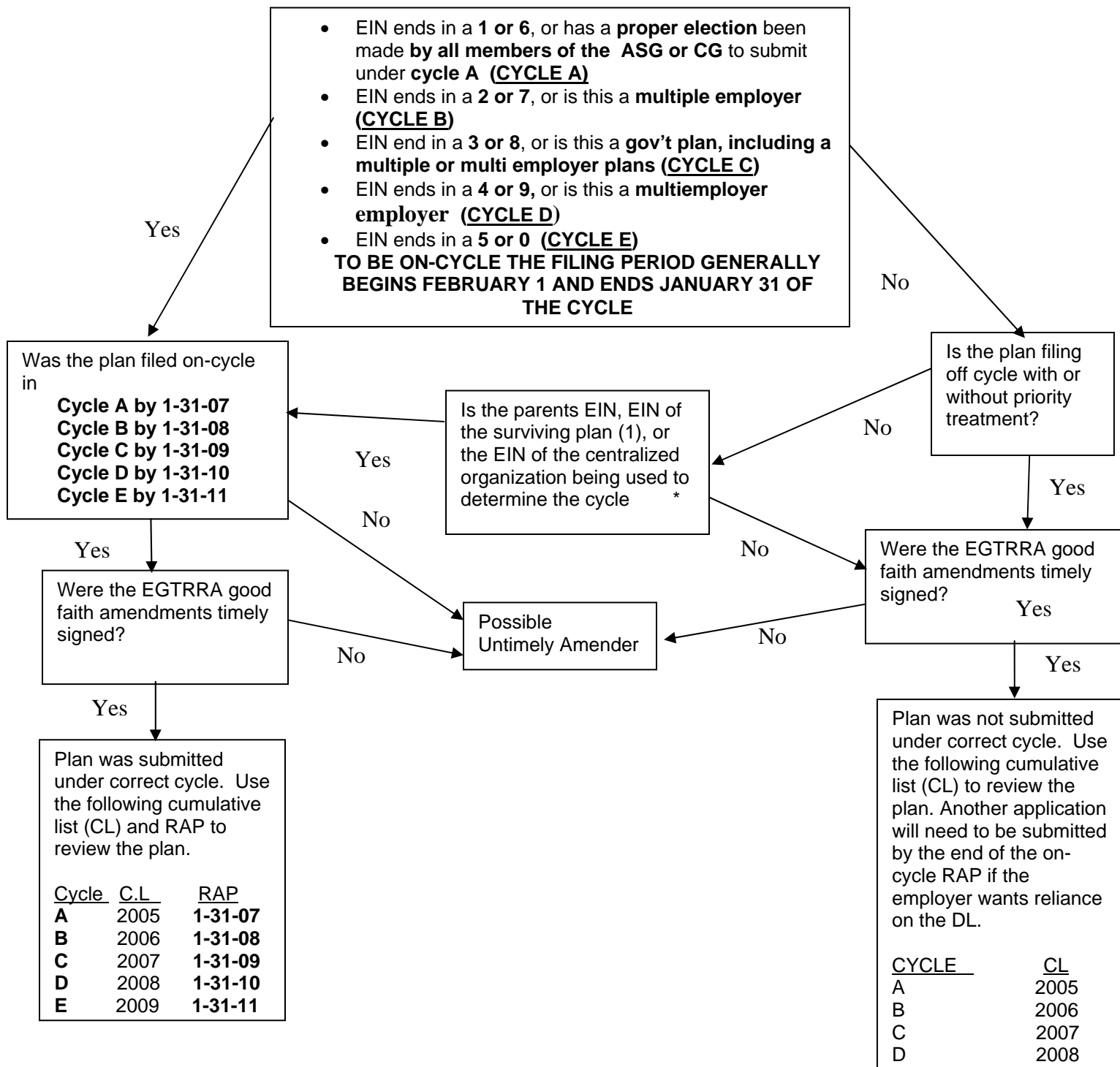
## **Plan Terminations**

For plan terminations the RAC will generally be shortened. Thus, any retroactive remedial plan amendments or other required amendments for a terminating plan must be adopted in connection with the plan termination. This will include plan amendments required to be adopted to reflect qualification requirements that apply as of the date of termination regardless of whether such requirements are included on the most recently published CL. An application will be deemed to be filed in connection with the plan termination if it is filed no later than the later of:

1. One year from the effective date of termination or
2. One year from the date on which the action terminating the plan is adopted

In no event can the application be filed later than 12 months from the date of distribution of substantially all plan assets.

## Exhibit 1 EGTRRA RAP FOR INDIVIDUALLY DESIGNED PLANS



(1) surviving plan means the remaining plan after a cycle changing event such as a merger, acquisition, spin-off, or change in EIN

\* If the answer is yes, then the plan is an on cycle plan